83-2120

No.

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MAY 1 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

ROBERT L. EVANS,

PETITIONER,

v.

LOCKHEED-GEORGIA COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT L. EVANS, PRO SE
1922 Turner Road, S.E.
Atlanta, Georgia 30315
(404) 627-8798
Petitioner

68pp

QUESTIONS PRESENTED

1. Whether the District Court has power to amend its judgment after ten days?

2. Whether the Court can amend its findings of fact and conclusions of law after the expiration of ten days?

3. Whether the District Court has jurisdiction over a case once notice of appeal has been filed?

4. Whether the Court misused its discretion and failed to perform its duty in directing counselors to draft the findings of fact and conclusions of law?

5. Whether certiorari should be granted to resolve the conflict between all other Courts of Appeal and the anomalous Eleventh Circuit rule, which is the subject of great confusion even among different panels of the Eleventh

QUESTIONS PRESENTED

Circuit*, and which has resulted in extensive and unnecessary litigation in that court?

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*Previously the Fifth Circuit.

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No.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983.

ROBERT L. EVANS, PRO SE

PETITIONER,

v.

LOCKHEED-GEORGIA COMPANY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The petitioner, Robert L. Evans, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for

the Eleventh Circuit entered on December 7, 1983.

The Court of Appeals entered its Memorandum decision affirming the District Court Judgment.[1/] A copy of the Memorandum is attached as Appendix A.

The Court denied petitioner's petition for rehearing and suggestion for rehearing en banc on January 31, 1984. A copy of the Order is attached as Appendix B.

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court below are those named in the caption of the case in this court.

OPINION BELOW

The opinion of the court below was unpublished. Said opinion is attached as Appendix A.

1/Except for taxation of cost, which was vacated and remanded.

JURISDICTION

On January 31, 1983 the Court of Appeals entered judgment affirming the District Court's judgment. (App. A) This Petition for Certiorari is filed within 90 days of denial of Plaintiff/ Petitioner's petition for rehearing. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY PROVISION INVOLVED

1. 42 U.S.C.A. §2000e, et seq., which provides in relevant part:

> It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.....

2. 42 U.S.C.A. §1981, which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

3. 29 U.S.C.A. §621, et seq., which provides in relevant part:

> It is therefore the purpose of this chapter to proximate employment of older persons based on their ability rather than age, to prohibit arbitrary age discrimination in employment.....

4. United States Constitution, Amendments V and XIV:

> Nor shall any person...be deprived of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

On January 31, 1984 a panel of the Eleventh Circuit Court of Appeals af-

firmed the judgment of the District Court[2/], that Defendant-Respondent did not discriminate against Plaintiff-Petitioner in a promotional procedure under 29 U.S.C.A. §621 et seq., and 42 U.S.C.A. §§1981, 2000e (Title VII), Robert L. Evans v. Lockheed-Georgia Company, Civil Action No. 83-8250 (not published). A timely petition for rehearing pursuant to Rule 35(d) and 40 of the Federal Rules of Appellate Procedure was filed on December 27, 1983, and the petition was denied on January 31, 1984 by the Eleventh Circuit.

2/Except as to the Clerk's taxation of costs to the extent that attorneys' fees were included which was ordered vacated and remanded for a determination by the District Court of whether defendant was entitled to attorneys' fees.

On March 4, 1983 a jury returned a verdict in favor of the Defendant in reply to two special interrogatories on petitioner's 29 U.S.C.A. §621 et seq. and 42 U.S.C.A. §1981 claims. (T-343)

The verdict was signed on March 7, 1983, granting Defendant cost of action. (R-292). The judgment of March 7, 1983 did not contain a decision on Petitioner's 42 U.S.C.A. §2000e claims, nor were there findings of fact and conclusions of law to support the jury verdict under 29 U.S.C.A. 621 et seq, and 42 U.S.C.A. §1981. (App. C)

On April 4, 1983, Petitioner filed his notice of appeal with the United States District Court for the Northern District, Atlanta (R-299).

On April 22, 1983, Respondent by letter brief moved the District Court to amend its judgment to include Respondent's recommended findings of fact and

conclusions of law, (R-305,330), forty-five days after the judgment was entered and eighteen days after notice of appeal had been filed.

On May 6, 1983, Petitioner objected to the Court's jurisdiction over the case, power to amend its judgment and usage of opposing counselor's findings of fact and conclusions of law. (R-338). On May 10, 1983, sixty-three days after the judgment was entered, and thirty-four days after notice of appeal had been filed, the District Court amended its judgment to include the identical findings of fact and conclusions of law submitted by Respondent on April 22, 1983. This judgment was entered nunc pro tunc which included a decision on Petitioner's Title VII claim (App. D).

On May 25, 1983 Petitioner filed his objection to the amended judgment and moved the Court to vacate its judgment,

(R-338) which was denied on June 17, 1983, including Petitioner's objection to the Court's jurisdiction and adoption of opposing counselor's findings of fact and conclusions of law. (Supp. T-39-45).

On July 18, 1983 petitioner filed his appeal brief[3/]. On July 25, 1983 the

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3/Errors plaintiff alleged committed by the trial court on appeal: (1) failure to make findings of fact and conclusions of law at the time judgment was entered; (2) amendment of judgment after expiration of time limit for such amendment by adding findings of fact and conclusions of law; (3) amendment of findings of fact and conclusions of law after expiration of time limit for such amendment; (4) amendment of judgment after the filing of notice of appeal; (5) adoption of the findings of fact and conclusions of law; (6) adoption of erroneous findings of fact and conclusions of law submitted by defense counsel; (7) failure to rule on a discovery motion submitted by defendant; (8) failure to rule on defendant's illegal employment practices; (9) acceptance of verdict which the evidence was not sufficient to support; (10) admission of testimony of the beneficiary of the discriminatory act regarding plaintiff's past conduct; (11) award of attorney's fees to the defendant.

District Court again amended its judgment to include additional findings of fact and conclusions of law that were verbatim to those submitted by counselor on July 6, 1983.

The Appeals Court affirmed the District Court's authority to amend its judgment to enter finding after expiration of 10 days, and jurisdiction over a case after notice of appeal had been filed.

The court stated:

> In a trial without a jury, the judge, as the trier of fact, must make findings of fact and conclusions of law, see Fed. R. Civ. P. 52(a). Generally, this must be done before the judgment is appealed. In this case, however, the trial court's failure to enter these findings and conclusions prior to judgment or before the filing of a notice of appeal, while irregular, was harmless. The record and briefs show that the trial court's conclusions are correct, and that its findings are adequately supported by the record. The determinations are consistent with the jury's finding that plaintiff was not intentionally denied promotion because of his

> race. As the district judge correctly recognized, the interests of judicial economy are served by his issuance of findings and conclusions reflecting the grounds for his decision prior to our review of this matter.

REASON FOR GRANTING THE WRIT

In this case, for the first time a judgment amended more than sixty days after time for amendment has expired is being sustained on appeal solely on the basis of judicial economy.

The time limit of Federal Rules of Civil Procedure 52(b)[4/] and 59(e)[5/]

4/Rule 52(b) states upon a motion made not later than 10 days the Court may amend its findings after entry of judgment.

5/Rule 59(e) states that a motion to alter or amend the judgment shall be served not later than 10 days after entry of judgment.

are statutory limitations.[6/] The District Court on May 10, 1983 lacked power and jurisdiction to amend its judgment and alter the findings of fact and conclusions of law.[7/] Cases submitted to the jury under Rule 49 require written findings upon each issue of fact. Banerjee v. Trustees of Smith College, 648 F.2d 61. The court cannot render a

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6/Motion to amend to make additional findings and to amend judgment must be made not later than 10 days after entry of judgment. Turner v. Ohman House Corp., C.A. Tenn. 1967, 376 F.2d 347.

7/Time limit dictated by this rule governing motions to amend judgment is mandatory and may not be extended by trial court. Cole v. Altieri, D.C. Pa. 1981, 534 F.Supp. 165. The ten-day time limitation fixed by this judgment is one of the few limiting periods which the court has no power to enlarge Scola v. Boat Frances, R., Inc., C.A. Mass. 1980, 618 F.2d 147.

verdict without a finding of facts on all of Petitioner's claims. See Prang Trucking Co. Inc. v. Local Union #469, 613 F.2d 1235; Swanson v. Levy, 509 F.2d 859; Gulf Towing Co. Inc. v. Stream Tanker, 648 F.2d 242.

Because this case is subject to pivot on the credibility of witnesses, the Court must comply with the time limitation for entering findings of fact. Petitioner finds it difficult, if not impossible, for the Court to make meticulous findings two (2) months after the trial date. U.S. v. Aluminum, 322 U.S. 716; Deutsch v. Hoge, 185 F.2d 259; U.S. v. Deapulse Corp., 457 F.2d 25; Continental Connector Corp. v. Houston Fearless Corp., 350 F.2d 183.

I.

The District Court does not have power to amend its judgment after ten days.

In Hudson v. Atchison, this Court established that neither the trial judge nor the appellate court can amend a judgment not made within ten days after reception of verdict. 82 S.Ct. 61; 289 F.2d 726; 368 U.S. 835.

This Court recently upheld Federal Rule of Civil Procedure 59(e) in Cole v. Attieri, D.C. Pa. 1984, 534 F.Supp. 165; Scola v. Boat Frances, R. Inc., C.A. Mass. 1980, 618 F.2d 147.

The Appeal Court affirming the District Court action in amending its judgment after ten days on two separate occasions is in conflict with this Court and between the circuits. This conflict requires resolution by this Court.

II.

The Court cannot amend its findings of fact and conclusions of law after expiration of 10 days after the verdict.

In Russell v. Monongabela Railway Co., this court established the rule that all motions for amendments, whether by counselors or the court, must be filed within 10 days after the verdict. 262 F.2d 349.[8/]

The Eleventh Circuit affirmed the Respondent's letter motion of 22 April to amend the findings and the court amended judgment of 10 May, 1983.

III.

The District Court does not have jurisdiction over a case once it has been docketed in the Appeal Court. All action

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8/ This rule was affirmed by this Court and Circuit Courts of Appeal in the following cases: Francis v. Southern Pacific Co., 10 Cir., 1947, 162 F.2d 813, affirmed, 1948, 333 U.S. 445, 68 S.Ct. 611, 92 L.Ed. 798; Cheffey v. Pennsylvania R.R. Co., D.C.E.D. Pa. 1948, 79 F.Supp. 252; McHugh v. Audet, D.C.M.D.Pa. 1947, 72 F.Supp. 394.

by the District Court after April 4, 1983 must be vacated.

The Eleventh Circuit appeal panel agreed with Petitioner that the findings of fact and conclusions of law must be entered before the judgment is appealed.

However, the panel termed this error of law in this case as irregular and harmless and in the interest of judicial economy. (App. A., p.3).

With the Appeal Court affirming the power of the District Court to proceed with amending its judgment to include findings after notice of appeal had been filed is an error of law which disregarded F.R.C.P. 52, 59 and 15.

In Browder v. Director Ill. Dept. of Corrections (1978) this Court ruled that:

> "When a petitioner has not sought any relief from the judgment entered...herein under the provisions of Rule 52(b) or Rule 59(a), (b), (e), Federal Rules of Civil Procedure, and the time for seeking the same has expired so as to render

this Court powerless to grant any such relief." 434 U.S. 257, 262, 98 S.Ct. 556."

The uncertainty created by the Court's failure to comply with the F.R.C.P. requires resolution by this Court.

IV.

The District Court abused its powers in (1) directing counselors to draft the findings of fact and conclusions of law, (2) adopting the findings of the successful party. These procedures should have been vacated by the Appeal Court.

In U.S. v. Crescent Amusement Co., this Court ruled that the findings should represent the Judge's own determination, and not the statement of the successful counsel. [323 U.S. 173, See U.S. v. Fornes, 125 F.2d 928; Armstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252] ensuring the standard of review for the Appeal Court.

Failure of the District Court to make independent findings void Petitioner the right of due process on the appeal level.

A case on point is Perry v. Baumonn, 122 F.2d 409, where the court stated that where district court made no findings of fact and stated no conclusions of law, order would be reversed and case remanded to district court.

This conflict between the circuits and the uncertainty created by the Eleventh Circuit panel opinion requires resolution by this Court.

V.

Federal Rules of Civil Procedure 52 and 59 are applied inconsistently by the Eleventh Circuit and other Appeals Courts.

Petitioner's argument regarding findings of fact are identical to those discussed in Beshop v. Lane, supra, wherein the court stated:

> The court's memorandum of Findings of Fact and Conclusions of Law was copied almost verbatim from proposed Findings of Fact and Conclusions of Law submitted by plaintiff's counsel. While the practice of allowing counsel for the prevailing party to write the trial judge's opinion has not been proscribed by this circuit, it should nevertheless be discouraged. Even though the court, in adopting plaintiff's findings and conclusions, stated that it had "individually considered" them and adopted them because it "believed them to be factually and legally correct," a cursory reading of the district court's memorandum leaves one with the impression that it was indeed written by the prevailing party to a bitter dispute. While the "clearly erroneous" rule of Fed.R.Civ.P. 52(a) applies to a trial judge's findings of fact whether he prepared them or they were developed by one of the parties and mechanically adopted by the judge, "we can take into account the District Court's lack of personal attention to factual findings in applying the clearly erroneous rule." Wilson v. Thompson, 593 F.2d 1375, 1384 n.16 (5th Cir. 1979). See also James v. Stockham Valves & Fittings Co., 559 F.2d 310, 314 n.1

(5th Cir. 1977); Volkswagen of America, Inc. v. Jahre, 472 F.2d 557, 559 (5th Cir. 1973). As was stated in James:

> "[T]he appellate court can feel slightly more confident in concluding that important evidence has been overlooked or inadequately considered" when factual findings were not the product of personal analysis and determination by the trial judge. 559 F.2d at 314 n.1, quoting Lou Dreyfus & Cie. v. Panama Canal Co., 29 F.2d 733, 738 (5th Cir. 1962).

A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948). "In other words, we reverse when the result in a particular case does not reflect the truth and the right of the case." Armstrong Cork Co. v. Wor Carpets, Inc., 597 F.2d 496, 501 (5th Cir. 1979). Such is the case here.

It is the court's duty to set forth preliminary and basic facts rather than statements that are conclusive in nature. Ruiz v. Estelle, 679 F.2d 1115 (1982);

Griggs v. Provident, 680 F.2d 927 (1982). Failure to comply is reversible error. U.S. v. Rohnn, 95 S.Ct. 1352, 400 U.S. 962 (1974); Bio-Medicus Inc. v. Shareholders, Inc., 608 F.2d 1155 (1979); U.S. v. Aluminum, supra; Clamitz v. Thatcher, 158 F.2d 687, 331 U.S. 825.

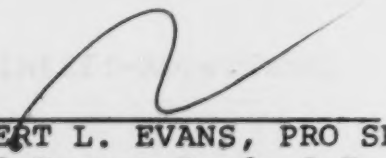
CONCLUSION

The essential question of this petition is whether the District Court can totally disregard Federal Rules of Civil Procedure and decisions affirmed by this Court. A district court cannot disregard a federal rule. U.S. v. Aluminum Co., 2 FRD 244. Petitioner contends that the Court was prohibited by law from amending its judgment after expiration of ten days.

For the foregoing reasons, Petitioner Robert L. Evans respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

DATED: _____ June, 1984.

Respectfully submitted,



ROBERT L. EVANS, PRO SE
1922 Turner Road, S.E.
Atlanta, Georgia 30315

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-8250

Non-Argument Calendar

ROBERT L. EVANS,

Plaintiff-Appellant,

versus

LOCKHEED-GEORGIA COMPANY,

Defendant-Appellee.

Appeal from the United States District Court

For The Northern District of Georgia

(December 7, 1983)

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM.

Robert L. Evans here appeals the district court's denial of relief for his race and age discrimination claims against his employer, Lockheed-Georgia Company, under 29 U.S.C.A. § 621, et seq., and 42 U.S.C.A. § 1981 and § 2000e (Title VII). Plaintiff asserts eleven "errors" committed by the trial court including an objection to the award of attorney's fees to defendant.[1] We affirm on all issues except the award of attorney's fees, which we vacate and remand for consideration by the district court under the Christianburg standard.

Six of plaintiff's claims on appeal concern the district court's issuance of findings of fact and conclusions of law pertaining to plaintiff's Title VII race discrimination claims. At trial, the jury verdict answering special interrogatories in favor of defendant was determinative of plaintiff's claims under 29 U.S.C.A. § 621 et seq. (age discrimination), and 42 U.S.C.A. § 1981 (racial discrimination), but was only advisory with respect to the Title VII questions. Based on the verdict which, contrary to plaintiff's argument, was amply supported by the evidence, the court entered judgment for the defendant on all claims on March 7, 1983. On April 4, 1983, plaintiff filed his notice of appeal. On May 10, 1983, the district court entered findings of fact and conclusions of law

relating to plaintiff's Title VII claims. These determinations were reconsidered and modified by the district court following a hearing conducted on June 16-17, 1983, at which plaintiff was afforded an opportunity to register objections and recommend changes.

In a trial without a jury, the judge, as the trier of fact, must make findings of fact and conclusions of law, see Fed. R. Civ. P. 52(a). Generally, this must be done before the judgment is appealed. In this case, however, the trial court's failure to enter these findings and conclusions prior to judgment or before the filing of a notice of appeal, while irregular, was harmless. The record and briefs shows that the trial court's conclusions are

correct, and that its findings are consistent with the jury's finding that plaintiff was not intentionally denied promotion because of his race. As the district judge correctly recognized, the interests of judicial economy are served by his issuance of findings and conclusions reflecting the grounds for his decision prior to our review of this matter.

Plaintiff's remaining assertions of error in the judgment are without merit. There was no reversible error in failing to specifically rule on defendant's motion to exclude its affirmative action plan from evidence, or to rule on plaintiff's claim that the defendant systematically discriminated on the basis of race. The district court's judgement

resolved all of plaintiff's claims. Admission of Mr. Dorsey's testimony was appropriate. Plaintiff had ample opportunity to establish on cross-examination that this witness was promoted to the position desired by plaintiff.

The trial court did not mention attorney's fees in its order but directed that all costs be taxed against the plaintiff. Plaintiff failed to object until April 20 to the inclusion of attorney's fees in the bill of costs submitted by defendant and taxed by the clerk on April 7. Ordinarily, such objections are waived unless raised within five days of the taxing of costs, see Fed. R. Civ. P. 54(d), although a court may, in its discretion, consider objections filed later, see Fed. R. Civ. P. 6; United States v. Kolesar, 313 F.2d 835 (5th Cir. 1963).

In actions under Title VII and 42 U.S.C.A. §1988, however, a defendant cannot get attorney's fees against a plaintiff until the court has first found the plaintiff's claims frivolous, unreasonable, groundless, or prosecuted in bad faith. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978) (such a finding required in Title VII actions); Lopez v. Aransas County Independent School District, 570 F.2d 541 (5th Cir. 1978) (Christianburg standard applied in §1988 action). In this case, no such finding was made. Defendant did not file a motion for allowance of attorney's fees until May 9, after they had been taxed as costs by the clerk. The trial court has not responded to that motion or to plaintiff's objection to the erroneous

inclusion of such fees by the clerk. Accordingly, we vacate the clerk's taxing of costs to the extent that attorney's fees were included, and remand for a determination by the district court of whether defendant is entitled to attorney's fees under the Christianburg standard.

We cannot hold that plaintiff acted friviously, unreasonably or in bad faith in pursuing this appeal. Defendant's request for attorney's fees on this appeal is therefore DENIED. Costs of this appeal shall be evenly divided between the parties.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

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1. (1) failure to make findings of fact and conclusions of law at the

time judgment was entered; (2) amendment of judgment after expiration of time limit for such amendment by adding findings of fact and conclusions of law; (3) amendment of findings of fact and conclusions of law after expiration of time limit for such amendment; (4) amendment of judgment after the filing of notice of appeal; (5) adoption of erroneous findings of fact and conclusions of law; (6) adoption of the findings of fact and conclusions of law submitted by defense counsel; (7) failure to rule on a discovery motion submitted by the defendant; (8) failure to rule on defendant's illegal employment practices; (9) acceptance of verdict which the evidence was not sufficient to support; (10) admission of testimony of the beneficiary of the discriminatory act regarding plaintiff's past conduct; (11) award of attorney's fees to the defendant.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-8250

ROBERT L. EVANS,

Plaintiff-Appellant,

versus

LOCKHEED-GEORGIA COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 7, 1983, 11 Cir., 198__, _____ F.2d _____).

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

APPENDIX C

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

District: Northern District of Georgia
Docket Number: C 82-657 A

TITLE:

Robert L. Evans

v.

Lockheed Georgia Company

JUDGE: Charles A. Moye, Jr.

x Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

x Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the plaintiff take nothing, that the action be dismissed on the merits and that the defendant LOCKHEED GEORGIA COMPANY recover of the plaintiff ROBERT L. EVANS its costs of action.

By Clerk:

/s/ Gary J. Drake Date: 3/7/83

APPENDIX D

AMENDED JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBERT L. EVANS	:	
	:	
vs.	:	CIVIL ACTION
	:	DOCKET NO. C82-
LOCKHEED-GEORGIA	:	657A
	:	

This action came on for consideration before the Court, United States District Judge Charles A. Moye, Jr. presiding. The issues having been duly considered and a decision having been duly rendered, it is ordered and adjudged finding in favor of the Defendant and against the plaintiff, that the plaintiff, ROBERT L. EVANS, take nothing on his claims under Title VII of the Civil Rights Act of 1964, nunc pro tunc, with all costs taxed against the plaintiff, ROBERT L. EVANS, and that the Defendant, LOCKHEED-GEORGIA COMPANY recover of the

Plaintiff ROBERT L. EVANS, all costs of this action.

Filed and Entered in Clerk's Office
nunc pro tunc.

May 10, 1983

BEN H. CARTER, Clerk

By: /s/ Allen Newman
Allen Newman,
Deputy Clerk

Dated at: Atlanta, Georgia

Date: March 7, 1983

/s/ Allen Newman
Allen Newman, Deputy Clerk of Court

No.

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

ROBERT L. EVANS,

PETITIONER,

v.

LOCKHEED-GEORGIA COMPANY,

RESPONDENT.

PROOF OF SERVICE

STATE OF GEORGIA)
)
COUNTY OF FULTON)

ROBERT L. EVANS, after being duly sworn, deposes and says that pursuant to Rule 28.4(a) of this Court he served the Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit

on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Mr. Richard Rice
Ms. Susan A. Cahoon
Mr. Edmund M. Kneisel
KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043

Mr. Robert P. Barton
Legal Department
LOCKHEED GEORGIA COMPANY
86 South Cobb Drive
Marietta, Georgia 30063

and depositing same in the United States Mail at Atlanta, Georgia on ____ day of _____, 1984.

_____
Robert L. Evans, Affiant

Subscribed and Sworn to
Before Me this ____ day
of _____, 1984.

_____
Notary Public

Office - Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT L. EVANS,
Petitioner,

v.

LOCKHEED-GEORGIA COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

EDMUND M. KNEISEL *
CHARLES M. RICE
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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by the Court are more appropriately stated as follows:

1. Should the Supreme Court grant certiorari to review the decisions of the court of appeals and the district court, which applied well-settled principles of law to the facts of this case in ruling on the merits of Petitioner's claims and in ruling on procedural issues which do not affect the substantive validity of the judgment entered for Respondent?

2. Should the Supreme Court grant certiorari to determine whether or not the trial court's procedural default, if any, in delaying the entry of findings of fact and conclusions of law until after the filing of an appeal constitutes reversible error where those findings are amply supported by the evidence and are consistent with the jury's conclusive finding that Petitioner had not been intentionally discriminated against on the basis of race?

SUBSIDIARIES AND AFFILIATES OF LOCKHEED CORPORATION

The following is a list of subsidiaries and affiliates of Lockheed Corporation:

Brophy & Associates, Inc.
Cadam Inc.
CSL Leasing Corporation
Datacom Collections Systems Corporation
Datacom Consultants, Inc.
Datacom Municipal Systems of Pennsylvania, Inc.
Datacom Municipal Systems of Ohio, Inc.
Datacom Systems Corporation
Dialog Information Services, Inc.
Guam Air Terminal Corporation
LFC Credit Corporation
Lockheed Aeromod Center, Incorporated
Lockheed Air Terminal, Inc.
Lockheed Air Terminal of New York, Inc.
Lockheed Air Terminal, S.A.
Lockheed Aircraft (Asia) Limited
Lockheed Aircraft (Australia) Pty. Limited
Lockheed Aircraft Deutschland GmbH
Lockheed Aircraft International, A.G.
Lockheed Aircraft International, Inc.
Lockheed Aircraft International Limited
Lockheed Aircraft Service-International
Lockheed Aircraft Service Singapore Private Limited
Lockheed Canada Inc.
Lockheed Corporation (Int'l) S.A.
Lockheed Dataplan, Inc.
Lockheed Domestic International Sales Corporation II
Lockheed Electronics Company, Inc.
Lockheed Engineering and
Management Services Company, Inc.
Lockheed Finance Corporation
Lockheed Georgia International Services, Inc.
Lockheed International Limited Taiwan

Lockheed International Service and
Investment Corporation
Lockheed Missile & Space Company, Inc.
Lockheed Mortgage Corporation
Lockheed Overseas Capital N.V.
Lockheed Shipbuilding Company
Lockheed Space Operations Company
Lockheed Support Systems, Inc.
Lockheed Systems Company, Inc.
Lockheed Technical Enterprises Corporation
Lockheed Technical Services Company, Inc.
Lockheed Technology S.A.
Lockheed Western Export Company
Memrykord Limited
Murdock Engineering Company
Oklahoma Fueling Facilities Corporation
Star Reconveyance Corporation
Tristar Parts, Ltd.
Colby Crane & Manufacturing, Inc.
Coventry Business Systems, Inc.
Datacom Municipal Systems of Texas, Inc.
Getex, Inc.
Lockheed Electronics International Operations, Inc.
Lockheed Systems & Services Company, Inc.
Macrodata Corporation
Puget Sound Bridge & Dry Dock Company, Inc.
Utah Fueling Facilities Corporation
Vega Aircraft Company
Arizona Fueling Facilities Corporation
Cadam Services Company
CTL Corporation
Gulf Technology Systems Group
Honolulu Fueling Facilities Corporation
Letlock Saudi Arabia Co., Ltd.
Lockheed-Arabia
Lockheed-Sait Electronics S.A.
Lockheed Technical Services (Malaysia) S.B.
Ocean Minerals, Inc.

Pacific Aerospace Corporation Limited
Panel Lock Homes (Phil.) Inc.
Portland Fueling Facilities Corporation
Reno Fueling Facilities Corporation
Transnational Housing Company
Lockheed Leadership Fund

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CITATIONS TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this action was not published. A copy of this opinion is attached to the Petition as Appendix "A." The findings of fact and conclusions of law entered by the United States District Court for the Northern District of Georgia in this action on May 10, 1983 were not published. A copy of these findings of fact and conclusions of law is attached hereto as Exhibit "B" of the Appendix. The findings of fact and conclusions of law entered by the district court on July 27, 1983 were published at 33 E.P.D. (CCH) ¶ 34,009. A copy of these findings of fact and conclusions of law is attached hereto as Exhibit "C" of the Appendix.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-2120

ROBERT L. EVANS,

Petitioner,

v.

LOCKHEED-GEORGIA COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Lockheed-Georgia Company respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Northern District of Georgia in favor of Respondent and against Petitioner.

STATEMENT OF THE CASE

Petitioner Robert L. Evans commenced this action against Respondent Lockheed-Georgia Company alleging that Respondent had denied him a promotion due to his race and age in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (hereinafter "Title VII"); 42 U.S.C. § 1981; and the Age Discrimination in

Employment Act, 29 U.S.C. § 621, *et seq.* The case was tried before a jury on March 2-4, 1983. At the conclusion of the trial, the question of liability for alleged age discrimination and race discrimination was submitted to the jury.[1] (R. 294; T. 334-336).[2] The Title VII and § 1981 claims of promotion discrimination involved identical issues of fact, and no additional evidence was tendered following submission of the case to the jury. The jury was considered by the trial court to be an advisory jury on the Title VII claim. (T. 284). Responding to special interrogatories, the jury expressly found that Petitioner had not been denied promotion intentionally on the basis of his race or his age. (T. 343; R. 294). *See* Appendix, Exhibit "A".

On March 7, 1983, consistent with the jury's verdict, the district court entered judgment in favor of Respondent on all of Petitioner's claims, including claims of disparate treatment on the basis of race under Title VII. The court awarded Respondent its costs in this action. (R. 298). On April 4, 1983, Petitioner filed his notice of appeal to the United States Court of Appeals for the Eleventh Circuit. (R. 299).

On May 10, 1983, in order to eliminate any need for a partial remand, the district court issued findings of fact and conclusions of law, which, consistently with the

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[1] Petitioner had demanded a trial by jury of his claims under 29 U.S.C. § 621, *et seq.* and 42 U.S.C. § 1981. (R.6). The parties reserved the question of damages pending the outcome of the jury's deliberations on the liability issues. (T. 5-6).

[2] In parenthetical citations, the letter "R." followed by a number refers to the page number in the appellate record at which the information preceding the citation may be found. The letter "T." followed by a number refers to the page number of the trial transcript. The designation "Supp. T." followed by a number refers to the page number of the supplemental transcript of the June 16-17, 1983 hearing on Petitioner's motion to vacate or reconsider the findings of fact and conclusions of law.

jury's answers to the special interrogatory on the question of racial discrimination, found in favor of Respondent with respect to Petitioner's Title VII claims. (R. 305-319). *See* Appendix, Exhibit "B". In issuing these findings and conclusions, the court essentially adopted the proposed findings of fact and conclusions of law which had been submitted by Respondent. On the same day, the district court entered a document labeled "Amended Judgment," nunc pro tunc, which specified that Petitioner was to take nothing on his claims under Title VII. (R. 320). This document did not alter or enlarge in any way the judgment which had been entered on March 7, 1983. On May 25, 1983, Petitioner filed with the district court a letter which the court treated as a motion to vacate or, in the alternative, for reconsideration of the findings of fact and conclusions of law entered on May 10, 1983. (R. 338-339). A hearing on that motion was held in open court on June 16 and 17, 1983 (Supp. T. 2-45) with the result that some findings of fact were modified (Supp. T. 40-41), but the court reaffirmed its earlier conclusions that the jury's verdict for Respondent was conclusive and that the facts presented at trial warranted entry of judgment for Respondent on all of Petitioner's claims because no discrimination had been proved. (Supp. T. 41-42). *See* Appendix, Exhibit "C", ¶¶ 10, 12.

The Eleventh Circuit affirmed the judgment of the district court, but reversed the award of costs to the extent that it included attorneys fees. With respect to the disrict court's findings of fact and conclusions of law, the Eleventh Circuit held that the failure of the court to enter these findings and conclusions prior to judgment or prior to the filing of a notice of appeal was an irregular but harmless practice. Moreover, the Eleventh Circuit found that the district court's conclusions of law were correct and that its findings of fact were consistent with the jury's finding that Petitioner had not been

intentionally denied promotion because of his race, a finding which the Eleventh Circuit concluded was "amply supported by the evidence."

SUMMARY OF THE ARGUMENT

The district court's issuance of findings of fact and conclusions of law regarding Petitioner's Title VII claims after the filing of a notice of appeal served the interests of judicial economy and conformed to applicable judicial authority, including a decision by this Court. The district court's adoption of amply supported findings of fact and conclusions of law proposed by Respondent, as modified at the request of Petitioner, was permissible under applicable judicial authority, and the Eleventh Circuit's approval of those findings and conclusions did not create a conflict with the law of any other circuit. In any event, the alleged procedural defects in the entry of findings of fact and conclusions of law did not affect the substantive validity of the judgment. The findings and conclusions were not clearly erroneous, and the judgment against Petitioner on his Title VII claims was mandated by the collateral estoppel effect of the jury's verdict against Petitioner on his identical promotion discrimination claims under 42 U.S.C. § 1981.

REASONS FOR DENYING THE PETITION

I. Petitioner's Statement of the Questions Presented and the Reasons for Granting the Writ Are Based on Inaccurate Descriptions of the Proceedings Below and Incorrect Statements of the Law.

Petitioner asserts that the district court amended its judgment in this action more than 10 days after entry of the judgment. This is a misleading description of the district court proceedings, for that court has never amended the substance of its March 7, 1983 judgment. The March 7, 1983 judgment adjudicated all of Peti-

tioner's promotion discrimination claims, including the age and racial discrimination claims triable as of right to the jury under 29 U.S.C. § 621, *et seq.* and 42 U.S.C. § 1981, as well as the racial discrimination claim tried to the jury in its advisory capacity under Title VII. The judgment ordered that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant recover of the plaintiff its costs of action. (R. 298). When the district court subsequently entered findings of fact and conclusions of law on the Title VII claim on May 10, 1983, it also entered a document labeled "Amended Judgment", which simply reiterated the March 7, 1983 judgment insofar as it applied to the plaintiff's Title VII claims. (R. 320). The "Amended Judgment" did not alter in any way the substance of the district court's March 7, 1983 judgment dismissing Petitioner's age and racial discrimination claims.

On May 10, 1983, the district court issued its findings of fact and conclusions of law with respect to Petitioner's Title VII claims. Petitioner asserts that these findings of fact and conclusions of law were erroneously entered by the district court because they were entered after the filing of a notice of appeal from the March 7, 1983 judgment and because they were taken largely from the proposed findings of fact and conclusions of law submitted by Respondent. Both of these procedural arguments are without merit and do not affect the substantive validity of the judgment.

Although Rule 52(a) of the Federal Rules of Civil Procedure requires a district court to issue findings of fact and conclusions of law in nonjury actions, including actions tried to an advisory jury, the essential purpose of this requirement is to aid the trial judge in the process of adjudication. *United States v. Birnbach*, 400 F.2d 378 (8th Cir. 1968); *Roberts v. Ross*, 344 F.2d 747 (3rd Cir. 1965); *Woods Construction Co. v. Pool Construction Co.*, 314 F.2d 405 (10th Cir. 1963). To this end, the

requirement for findings of fact is designed to aid the trial judge in considering the evidence supporting his factual determinations.[3]

In nonjury cases, entry of findings of fact and conclusions of law also aids the appellate court in reviewing a case by affording the court an understanding of the grounds or bases for the trial court's decision. *Williamson v. Tucker*, 645 F.2d 404 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981); *Ramirez v. Hofheinz*, 619 F.2d 442 (5th Cir. 1980). When a trial court has failed to issue any findings of fact or conclusions of law or when the findings and conclusions that were issued do not aid in reviewing the validity of the judgment, the appellate court *may* vacate the judgment and remand the case to the district court with directions to issue appropriate findings of fact and conclusions of law. *See, e.g., Sellers v. Wollman*, 510 F.2d 119 (5th Cir. 1975); *Daniel v. Washington County Board of Education*, 488 F.2d 82 (5th Cir. 1973). To avoid the possibility of such a remand, the district court in the instant action issued findings of fact and conclusions of law regarding Petitioner's Title VII claims after the action was docketed for appeal. *See* Appendix, Exhibits "B" and "C". Petitioner now asserts that the district court lacked the authority to issue such findings and conclusions because it lost jurisdiction over the case upon the filing of an appeal in this action.

Petitioner's position has previously been rejected by this Court. In *Gibbs v. Buck*, 307 U.S. 66 (1939), this Court held that a district court's issuance of findings of

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[3] As pointed out at pp. 9-10, the ultimate factual determination that the Petitioner had not been denied promotion intentionally on the basis of his race under 42 U.S.C. § 1981 was made by the jury in response to a special interrogatory. This finding, which was dispositive of the claim triable as of right to the jury, *see* note 1, *supra*, should be conclusive of the identical factual issue on the nonjury Title VII claim.

fact and conclusions of law after the docketing of an appeal in the action did not warrant the reversal of the district court's order to which the findings of fact and conclusions of law applied. *See also, Johnson v. Heyd*, 415 F.2d 1005 (5th Cir. 1969); *Reinstine v. Rosenfield*, 111 F.2d 892 (7th Cir. 1940). In finding no error in the issuance of findings of fact and conclusions of law nearly five months after judgment and after the filing of a notice of appeal, the Seventh Circuit has observed:

> If there had been no findings made we have no doubt that it would have been the duty of this court to require the District Court to make special findings, and to have them certified here for our consideration in determining the validity of the decree. The District Court, however, in this case anticipated such a ruling and subsequently filed its special findings and conclusions of law.

Reinstine v. Rosenfield, 111 F.2d 892, 894 (7th Cir. 1940). Thus, in the interest of judicial economy, this Court and several courts of appeal, including the court below in this case, have held that a district court does have jurisdiction to issue findings of fact and conclusions of law after the filing of a notice of appeal where such findings and conclusions were not issued prior to or concomitant with the judgment.

Similarly, Petitioner has misstated both the facts and the law regarding the district court's adoption of findings of fact and conclusions of law suggested by counsel. The district court initially adopted on May 10, 1984 the proposed findings and conclusions submitted by counsel for Respondent, but pursuant to a motion filed by Petitioner objecting to the findings and conclusions as "clearly erroneous," the district court convened a hearing to consider Petitioner's objections. At the hearing, the attorneys for Petitioner were unable to cite any record evidence showing that the May 10 findings of fact and conclusions of law were "clearly erroneous," and after suggesting a few

minor modifications which were adopted by the district court, counsel for Petitioner withdrew any further request to modify the findings of fact. (Supp. T. 39-41). Accordingly, Petitioner's assertion that the district court adopted Respondent's proposed findings of fact and conclusions of law is a misleading and inaccurate statement of the facts in that it omits any mention of Petitioner's waiver of his opportunity to suggest modifications to the district court's findings.

Petitioner has also misstated the law regarding a district court's adoption of findings of fact and conclusions of law proposed by counsel for one of the parties. Contrary to Petitioner's assertions, a district court may adopt as its own the proposed findings of fact and conclusions of law submitted by counsel. *See, e.g., United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *Nissho-Iwai Co. v. Star Bulk Shipping Co.*, 503 F.2d 596 (9th Cir. 1974); *Schwerman Trucking Co. v. Gartland S. S. Co.*, 496 F.2d 466 (7th Cir. 1974); *Volkswagen of America, Inc. v. Jahre*, 472 F.2d 557 (5th Cir. 1973); *Bradley v. Maryland Casualty Co.*, 382 F.2d 415 (8th Cir. 1967); *O'Leary v. Liggett Drug Co.*, 150 F.2d 656 (6th Cir.), *cert. denied*, 326 U.S. 773 (1945). Such findings of fact and conclusions of law, even if adopted verbatim from the proposed findings and conclusions of the prevailing party, constitute the findings and conclusions of the district court and will stand if supported by the evidence. *See, e.g., United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).

In the instant action, each of the district court's findings of fact was annotated with appropriate references to the trial transcript and exhibits. On appellate review, the Eleventh Circuit found the district court's conclusions of law to be correct and its findings of fact to be consistent with the jury's amply supported finding with respect to

the § 1981 claim. Accordingly, there is no basis in the record for Petitioner's assertion that the Eleventh Circuit's approval of the district court's findings and conclusions was in any way erroneous or in conflict with the law in other circuits.

II. Even if There Had Been Some Procedural Deficiency in the Issuance of the District Court's Findings of Fact and Conclusions of Law, the Doctrine of Collateral Estoppel Mandated the District Court's Ruling in Favor of Respondent on Petitioner's Title VII Claims.

The same promotion discrimination issues were being tried under Title VII as were tried under § 1981. Both claims involved alleged disparate treatment on the basis of race, which requires proof of intentional racial discrimination. *See, e.g., General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). The jury conclusively resolved that issue by answering "no" to the special interrogatory on the question of intentional racial discrimination. (R. 294); Appendix, Exhibit "A." Under the doctrine of collateral estoppel, the trial judge was bound by the jury's controlling verdict on the claim under § 1981 and could not enter a contradictory decision on the identical claim of promotion discrimination under Title VII. *Lartius v. Iowa Department of Transportation*, 31 F.E.P. Cas. 1120 (8th Cir. 1983); *Johnson v. University of Bridgeport*, 20 F.E.P. Cas. 1766 (D. Conn. 1977). *Cf. Nilson v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983) (*en banc*) (summary judgment on Title VII claims bars subsequent § 1981 claim); *Fleming v. Travenol Laboratories, Inc.*, 707 F.2d 829 (5th Cir. 1983) (summary judgment on § 1981 claim bars subsequent Title VII action based on same facts). Since Petitioner's Title VII claim was precluded by the judgment on the § 1981 claim, separate findings of fact actually were unnecessary and were not required in aiding the trial

judge's ultimate conclusion (which effectively was mandated by the jury's verdict).

Petitioner does not point out any error of substance in the jury verdict on the § 1981 claim and has not even petitioned for review of the court of appeals' ruling affirming the judgment for Respondent on that claim. As concluded by the court below, that verdict is supported by the substantial weight of the evidence. Under these circumstances, even if the trial court were not bound to follow the jury's verdict in finding no discrimination under Title VII, no evidence whatsoever shows that the findings and conclusions the trial court entered were clearly erroneous in any way.

Although Petitioner asserts that his petition should be granted to resolve a conflict among the circuits, no such conflict exists. Petitioner has identified no cases prohibiting a district court from issuing findings of fact and conclusions of law after the filing of an appeal, nor has Petitioner identified any cases prohibiting a district court from adopting findings of fact and conclusions of law proposed by counsel where such findings are amply supported by the evidence. Moreover, Petitioner may not now challenge the district court's amendment of its findings of fact and conclusions of law, for the only modifications which the court made in its findings were made at the request of Petitioner.

The decision below is not in conflict with any other reported decision. As it complies with earlier decisions of this Court and other circuit courts, it is of no significant precedential value. Moreover, the decision below affects no one other than the parties to this action. There are no special or important reasons that would merit this Court's reviewing the decisions of the court of appeals and the district court. Consequently, the petition for a writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. C82-657A

ROBERT L. EVANS,
Plaintiff,

v.

LOCKHEED-GEORGIA COMPANY, a Division
of Lockheed Corporation,
Defendant.

[Filed March 4, 1983]

SPECIAL INTERROGATORIES TO THE JURY

I. ON THE ISSUE OF LIABILITY

QUESTION NO. 1: Relating to Age Discrimination

(a) Do you find from a preponderance of the evidence that plaintiff was denied promotion intentionally on the basis of age and that Mr. Dorsey was promoted to the position of Manufacturing Planner because he was younger than plaintiff?

Answer: Yes ——— No ✓———

QUESTION NO. 2: Relating to Racial Discrimination

(a) Do you find from preponderance of the evidence that plaintiff was denied promotion intentionally because of his race and that Mr. Dorsey was promoted to the position of Manufacturing Planner because he was white?

Answer: Yes ——— No ✓———

We, the jury, are unanimous in answering the above questions based on a preponderance of the evidence, and hereby return our verdict accordingly.

This the 4th day of March, 1983.

/s/ Robinson Kopp
(Foreperson)

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. C82-657A

ROBERT L. EVANS,
Plaintiff,

v.

LOCKHEED-GEORGIA COMPANY,
Defendant.

[Filed May 10, 1983]

ORDER

This action came before the Court for a trial on the merits of plaintiff's age and race discrimination claims on March 2, 3 and 4, 1983. The parties agreed that plaintiff's claims of alleged promotion discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (hereinafter "Title VII") and under 42 U.S.C. § 1981 were based on identical theories of disparate treatment on the basis of race. The parties further agreed that the jury's verdict on the disparate treatment claims under 42 U.S.C. § 1981 would be dispositive of the claims under Title VII. The jury returned a verdict for defendant on the question of liability under 42 U.S.C. § 1981 (and on plaintiff's age discrimination claims); therefore, consistent with the agreement of the parties, judgement was entered for defendant Lockheed-Georgia Co. (hereinafter "Lockheed") in accordance with

the jury's verdict on March 7, 1983. While the jury's verdict should be conclusive as to all claims, *see Johnson v. University of Bridgeport*, 20 F.E.P. Cas. 1966 (D. Conn. 1979); *cf. Nilson v. City of Moss Point*, —— F.2d ——, BNA Daily Labor Report No. 69, pg. D-1, Case No. 81-4055 (5th Cir. April 1, 1983) (en banc) (summary judgment on Title VII claims bars § 1981 claim), in the interest of ensuing conformity with Rule 39(c) and 52(a), Fed. R. Civ. P. and to prevent the possibility of a piecemeal appeal, the Court hereby enters the following finding of fact and conclusions of law with respect to plaintiff's Title VII claims:

I. *FINDINGS OF FACT*

1.

Plaintiff Robert L. Evans, a black male, presently is employed by defendant Lockheed as a Tool Planner in Department 47-11 of Lockheed's Marietta, Georgia facility.

2.

Lockheed engages in the manufacture and sale of aircraft and related products within the Northern District of Georgia.

3.

Lockheed employs in excess of fifteen (15) employees and is an "employer" within the meaning of 42 U.S.C. § 2000e, *et seq.*

4.

Plaintiff was hired initially by Lockheed in the mid-1950's and worked in various jobs until 1966, when he was promoted to the job of Tool Planner. He remained employed as a Tool Planner until 1970.

5.

In 1970, in conjunction with a massive work force reduction at the end of the C-5A contract, plaintiff was downgraded in accordance with union contract seniority provisions to a machine operator position. Later in 1970 plaintiff was placed on medical leave, which was extended until late 1972, when his employment was terminated.

6.

Plaintiff initially testified that he had not received any notice of his termination from medical leave; however, on cross examination, plaintiff was shown certified mail letters explaining his status, which he then acknowledged he had received from Lockheed.

7.

On September 4, 1979, Lockheed rehired plaintiff, and since that time he has been employed exclusively as a Tool Planner in Department 47-11, assigned to the C-130 structures group.

8.

After his active employment with Lockheed ended in 1970, plaintiff obtained a master of divinity degree. Plaintiff continued his religious education after he was rehired by Lockheed in 1979, and he ultimately obtained a doctor of divinity degree.

9.

Plaintiff's religious studies after being rehired were pursued with Lockheed's knowledge, and the company permitted him to take excused absences from work to complete his education leading to the doctor of divinity degree. Plaintiff was not told that his absence record would not be considered in relation to his eligibility for promotion.

10.

In addition to his religious studies, plaintiff has served as pastor for several church congregations. Whether as a result of his religious activities or for other reasons, plaintiff regularly had a high rate of unexcused absences and tardies and sometimes left work early (known as a "short time"). From the time of plaintiff's rehire in 1979 to May 5, 1981, plaintiff's periodic employee reviews show a total of 39 absences, tardies, and short times.

11.

Plaintiff has never received any employment related commendations or citations from Lockheed; however, between 1964 and 1967, plaintiff received several disciplinary notices for excessive absenteeism. After his rehire in 1979, plaintiff received two more disciplinary notices. One was for a violation of a company traffic regulation, and the other was for running to exit the plant at the time of a shift change.

12.

The job of Tool Planner is an hourly, nonmanagement position which involves the drawing up of plans for the use of Lockheed's manufacturing organizations in the construction of aircraft. Without such plans, the production workers would be unable to carry out the engineering designs and construct the aircraft. Thus, the planning division of Lockheed involves a critically important function in coordinating the execution of plans and specifications for the construction of aircraft.

13.

Hourly rated Tool Planners receive their job assignments from a Manufacturing Planner. The job of Manufacturing Planner is a salaried, non-supervisory position, which involves working closely with the Tool Planner

both in making job assignments and in helping the Tool Planners overcome any trouble or problems they may have in carrying out their job assignments.

14.

Jobs assigned to a Tool Planner may take anywhere from 80 manhours to 1500 manhours to complete; and good, reliable attendance is required to ensure the timely completion of longer assignments. The more varied experience a Tool Planner has at longer, complex jobs, the better qualified he will be for possible promotion to Manufacturing Planner.

15.

Because of his high rate of absenteeism (both excused and unexcused) plaintiff could not be assigned many varied, long-range projects as a Tool Planner, but usually performed planning jobs ranging from 80 to 150 hours. Moreover, plaintiff's supervisors testified that he was often absent from his work station for long periods of time, without explanation. As a result of his attendance deficiencies, plaintiff could not be assigned to long term, complex jobs which would have demonstrated his proficiency and qualified him for promotion to Manufacturing Planner.

16.

Plaintiff did not make any effort to improve his attendance after his rehire. His co-workers testified that he had told them that he felt like he could come and go at Lockheed as he pleased, or words to that effect. As a result of his work habits and attendance, Lockheed supervision perceived that plaintiff did not have a positive, dedicated attitude towards his job.

17.

The final selection of individuals to be promoted to the job of Manufacturing Planner is made by a Manage-

ment Selection Committee composed of various heads of departments within the planning organization. The Committee reviews the personnel records and qualifications of candidates for promotion. Manufacturing Planner positions are filled from a pool of many highly qualified Tool Planner candidates, including persons who previously had been employed as Manufacturing Planners.

18.

Plaintiff contends that he was discriminated against on the basis of race when Lockheed promoted three white employees, Messrs. Dorsey, Owens and Montgomery, from Tool Planner to Manufacturing Planner. Consistent with the jury's finding of no discrimination, the evidence does not show that Lockheed used race as a consideration in making these promotions. Lockheed has presented substantial evidence showing that the promotion decisions in issue were based on legitimate considerations unrelated to race, including:

(a) Plaintiff has been employed in the Tool Planner job slightly longer than either Dorsey or Owens (if their time in that job in the mid 60's is counted); however, most of plaintiff's experience in the Tool Planner job since 1979 has been in short-range projects. There is no evidence to suggest that the Tool Planner experience of Dorsey or Owens since 1979 was similarly limited. Mr. Montgomery, who has been employed continuously by Lockheed since 1951, has considerably more experience than plaintiff as a Tool Planner, and he previously held the job of Manufacturing Planner.

(b) Plaintiff's attendance record after his rehire is substantially inferior to the attendance records of Dorsey and Owens for the same time period. Although Montgomery had attendance deficiencies, he had been rated disabled by the Veterans Administration; and his absences were medically-related. In addition, in accordance

with a conciliation agreement entered to resolve a charge of handicap discrimination filed by Mr. Montgomery against Lockheed, he was promoted only after his attendance substantially improved.

(c) Plaintiff has received no commendations or citations for his job performance at any time during his career with Lockheed. In contrast, Dorsey, Owens, and Montgomery have each received several commendations and citations.

(d) Plaintiff has received several disciplinary notices from Lockheed, including three for excessive absenteeism. In contrast, there is no evidence in the record to suggest that Dorsey, Owens, or Montgomery ever received a disciplinary notice.

19.

Plaintiff's failure to be promoted to Manufacturing Planner was based solely on his poor attendance; the resultant limited scope of his Tool Planner assignments; and Lockheed's documented perception that Dorsey, Owens, and Montgomery were better qualified for the job of Manufacturing Planner than plaintiff. The promotion decisions in issue were not based on plaintiff's race.

II. *CONCLUSIONS OF LAW*

1.

The jurisdiction of this Court is invoked pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, 42 U.S.C. § 1981, and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, to redress plaintiff's claims that he was discriminated against because of his race and age with respect to promotions.

2.

In a disparate treatment case under Title VII, plaintiff has the burden of proving by preponderance of the

evidence that he was discriminated against on the basis of race by Lockheed's less favorable treatment of him in comparison to Lockheed's treatment of similarly situated whites. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

3.

To establish discrimination plaintiff must first make out a prima facie case by

> [proving] actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act."

Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978). *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Cartagena v. Secretary of the Navy*, 618 F.2d 130 (1st Cir. 1980); *Ambush v. Montgomery County Government*, 620 F.2d 1048 (4th Cir. 1980).

4.

Plaintiff may establish a prima facie case of promotion discrimination, by proving (1) that he was a member of a group protected by Title VII; (2) that non-minorities received promotions for which plaintiff was qualified during the relevant time peroid; (3) and that he was as qualified (by reason of performance, training, and experience) or more qualified than the non-minority persons who received the promotions. *See, e.g., Texas Department of Community Affairs v. Burdine, supra*; *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981); *Ramirez v. Hofheinz*, 619 F.2d 442 (5th Cir. 1980).

5.

Lockheed does not have the burden of proving that the promotion decisions in issue were not based upon plaintiff's race. The burden of proof of discrimination remains upon the plaintiff throughout the case. In addition, where the defendant offers evidence to show that its promotion decisions were based on reasonable, non-discriminatory factors, such as comparative qualifications or attendance, plaintiff has the burden of negating such evidence by proving that such factors were a mere pretext for discrimination. *Texas Department of Community Affairs v. Burdine, supra*; *Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221 (11th Cir. 1982); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978); *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977); *Bittar v. Air Canada*, 512 F.2d 582 (5th Cir. 1975).

6.

The decision as to what criteria shall be considered in determining the qualifications for a job lies fully in the hands of the employer, so long as prohibited, discriminatory criteria are not applied. *Ramirez v. Hofheinz*, 619 F.2d 442 (5th Cir. 1980); *Carter v. Lockheed-Georgia Co.*, 31 E.P.D. ¶ 33,354 (N.D. Ga. Dec. 14, 1982); *Bay v. Goodyear Tire and Rubber Co.*, 23 E.P.D. ¶ 30,903 (S.D. Tex. 1980), *aff'd mem.*, 638 F.2d 1233 (5th Cir. 1981).

7.

A defendant in a case such as this is not required to prove that it made the best possible business decision or even that the business decisions in issue were wise or correct. It is not the function of the Court to second guess the defendant company's rational, business judgments, if it finds the company has explained a legitimate reason for its decision not to promote plaintiff. *Texas Department of Community Affairs v. Burdine, supra*;

Furnco Construction Corp. v. Waters, supra; *Moore v. Sears, Roebuck & Co.*, 683 F.2d 1321 (11th Cir. 1982); *Harberson v. Monsanto Textiles Co.*, 13 E.P.D. ¶ 11,586 (D.S.C. 1976).

8.

If Lockheed explains a legitimate business reason for the promotion decisions in issue, then plaintiff is not entitled to prevail unless he proves that Lockheed's explanation was a pretext, that is, merely an excuse for discriminating against plaintiff on the basis of his race. In order to prove pretext, plaintiff must show either that he met Lockheed's qualifications for promotion, including Lockheed's attendance standards or that other employees not within plaintiff's protected class who had poorer records of performance or similar records of attendance were promoted despite their records. *Texas Department of Community Affairs v. Burdine, supra*; *Anderson v. Savage Laboratories, Inc., supra.*

9.

The evidence does not show that any poorer performing, lesser qualified white employee received a promotion that plaintiff should have received at any time pertinent to this case. *Ramirez v. Hofheinz, supra*; *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980); *Cartagena v. Secretary of the Navy, supra.*

10.

After hearing the same evidence heard by this Court, the jury in this action concluded that plaintiff had not been intentionally denied promotion because of his race or because of his age. The jury's verdict for Lockheed on plaintiff's racial discrimination claim under 42 U.S.C. § 1981 is conclusive between the parties as to plaintiff's Title VII claim because both claims were based solely on alleged disparate treatment on the basis of race. *Johnson v. University of Bridgeport*, 20 F.E.P. Cas. 1766 (D.

Conn. 1979). *See Nilson v. City of Moss Point*, —— F.2d ——, *B.N.A. Daily Labor Report* No. 69, Pg. D-1 (5th Cir. April 1, 1983) (en banc).

11.

Considering Mr. Montgomery's extensive prior experience in the job of Manufacturing Planner and as a Tool Planner, the evidence does not support a pretext claim based upon disparate application of Lockheed's attendance policies. On the contrary, Lockheed's promotion of Mr. Montgomery (after his attendance improved) as part of an agreement to settle his disabled veteran discrimination claim establishes a nonpretextual reason other than race for that promotion. *See e.g., United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Hunter v. St. Louis-San Francisco Railway Co.*, 639 F.2d 424 (8th Cir. 1981); *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980).

12.

Pretermitting the question of whether or not plaintiff presented sufficient evidence to establish a prima facie case of promotion discrimination on the basis of race, defendant has offered substantial evidence that any adverse actions concerning the plaintiff were based on good faith, legitimate business considerations. Plaintiff has not submitted any evidence which the Court believes would warrant a finding that Lockheed's explanations for its actions were merely pretextual, or that plaintiff's race was a contributing factor leading to Lockheed's failure to promote him. *Texas Department of Community Affairs v. Burdine, supra. See, e.g., Anderson v. Savage Laboratories, Inc., supra*; *Smalley v. Eatonville*, 640 F.2d 765 (5th Cir. 1980); *Corley v. Jackson Police Department*, 566 F.2d 994 (5th Cir. 1978); *Tonka v. American Telephone & Telegraph Co.*, 26 E.P.D. ¶ 31,963 (N.D. Ga. 1980), *aff'd mem.*, 679 F.2d 251 (11th Cir. 1982).

Accordingly, pursuant to the findings of fact and conclusions of law set out above, plaintiff should take nothing on his claims under Title VII of the Civil Rights Act of 1964, and the judgment entered for Lockheed on March 7, 1983 should be amended accordingly, nunc pro tunc, with all costs taxed against plaintiff.

IS IS SO ORDERED.

This 4 day of May, 1983.

/s/ Charles A. Moye, Jr.
CHARLES A. MOYE, JR.
Judge
United States District Court

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. C82-657A

ROBERT L. EVANS,
Plaintiff,

v.

LOCKHEED-GEORGIA COMPANY,
Defendant.

[Filed July 27, 1983]

ORDER

This action came before the Court for trial on the merits of plaintiff's age and race discrimination claims on March 2, 3, and 4, 1983. Plaintiff's claims of alleged discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, (hereinafter "Title VII") and under 42 U.S.C. § 1981 were based on identical theories of disparate treatment on the basis of race. The parties agreed that the jury's verdict on the question of liability under 42 U.S.C. § 1981 would be dispositive and that the jury would be an advisory jury as to plaintiff's claims under Title VII. (Tr-284).

After deliberation, the jury returned a verdict for defendant on the question of liability under 42 U.S.C. § 1981 (and on plaintiff's age discrimination claims) by answering two special interrogatories in the negative.

Question No. 2, relating to racial discrimination, inquired as follows: "Do you find from a preponderance of the evidence that plaintiff was denied promotion intentionally because of his race and that Mr. Dorsey was promoted to the position of manufacturing planner because he was white?" The Court agreed with the jury's factual findings and concluded as a matter of law that the negative answer to this question should be conclusive as to plaintiff's identical claims under Title VII. *See, e.g., Lartius v. Iowa Department of Transportation*, 31 F.E.P. Cas. 1120 (8th Cir. 1983); *Johnson v. University of Bridgeport*, 20 F.E.P. Cas. 1966 (D. Conn. 1977). *Cf. Nilson v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983) (*en banc*) (summary judgment on Title VII claims bars § 1981 claim). As a result, judgment was entered for defendant Lockheed-Georgia Co. (hereinafter "Lockheed") on March 7, 1983 in accordance with the jury's verdict.

On or about April 22, 1983, following the filing of a notice of appeal by counsel for plaintiff, counsel for defendant wrote to advise the Court of a possibility that the Court's reliance on the jury's verdict on the 1981 claims might not constitute compliance with the requirement for the making of findings of fact and conclusions of law in accordance with Rules 39(c) and 52(a), Fed. R. Civ. P. The defendant, therefore, submitted findings of fact and conclusions of law, which were adopted by the Court and entered on May 10, 1983. Counsel for plaintiff wrote letters to the Court, dated May 6 and May 24, 1983, arguing, inter alia, that the Court lacked jurisdiction to enter defendant's proposed findings of fact and conclusions of law after an appeal had been filed and more than 10 days after the entry of judgment; that the findings of fact and amended judgment entered on May 10, 1983 should be vacated; and that the Court should order a new trial on all plaintiff's claims. Plaintiff apparently intended the May 24, 1983 letter to be a formal motion, for it was filed of record, together with a sup-

porting brief on May 25, 1983. The Court treated plaintiff's filing of May 25, 1983, as a motion to vacate or, in the alternative, for reconsideration of the findings of fact and conclusions of law entered May 10, 1983. A hearing on that motion was conducted in open court on June 16 and 17, 1983, with the result that some findings of fact were modified pursuant to the discussion held. After a recess, counsel for plaintiff announced that he did not seek further modification of the findings of fact or conclusions of law, but instead intended to rely on appeal upon the legal proposition that this Court had and continues to have no power to enter any such findings of fact and conclusions of law at this stage in the case.

This Court recognizes that as a normal matter, once a notice of appeal in a civil case has been entered, the trial court is without jurisdiction further to modify its judgment or its findings of fact and conclusions of law. In the interest of judicial economy, however, the Court is adopting as its own counsel for defendant's proposed findings of fact and conclusions of law, as modified herein, the Court specifically ruling that these are the findings of fact and conclusions of law that it would make should the Court of Appeals deem it necessary to remand the case for that purpose. *See, e.g., Gibbs v. Buck*, 307 U.S. 66, 59 S.Ct. 725 (1939) (the interests of judicial economy and efficiency permit the post-judgment entry of findings of fact and conclusions of law, even after the filing of a notice of appeal); *Johnson v. Heyd*, 451 F.2d 1005 (5th Cir. 1969). The Court further finds as a matter of fact, based upon the record before it, that there has been no racial discrimination proven as against the defendant; and, as a conclusion of law, that the plaintiff is not entitled to recover against the defendant pursuant to Title VII. Accordingly, the Court hereby enters the following modified findings of fact and conclusions of law with respect to plaintiff's claims under Title VII:

I. *FINDINGS OF FACT*

1.

Plaintiff Robert L. Evans, a black male, presently is employed by defendant Lockheed as a Tool Planner in Department 47-11 of Lockheed's Marietta, Georgia facility. (Tr. 20)

2.

Lockheed engages in the manufacture and sale of aircraft and related products within the Northern District of Georgia. (Tr. 20)

3.

Lockheed employs in excess of fifteen (15) employees and is an "employer" within the meaning of 42 U.S.C. § 2000e, *et seq.* (Tr. 20)

4.

Plaintiff was hired initially by Lockheed in the mid-1950's and worked in various jobs until 1966, when he was promoted to the job of Tool Planner. He remained employed as a Tool Planner until 1970. (Tr. 20)

5.

In 1970, in conjunction with a massive work force reduction at the end of the C-5A contract, plaintiff was downgraded in accordance with union contract seniority provisions to a machine operator position. Later in 1970 plaintiff was placed on medical leave, which was extended until late 1972, when his employment was terminated. (Tr. 20)

6.

Plaintiff initially testified that he had not received any notice of his termination in December, 1970, for medical leave; however, on cross-examination, plaintiff was shown certified mail letters, dated March 9, 1971 and June 9,

1971, explaining his status, which he then acknowledged he had received from Lockheed. (Tr. 110-13; Defendant's Exhibits 1B and 1C).

7.

On September 4, 1979, Lockheed rehired plaintiff, and since that time he has been employed exclusively as a Tool Planner in Department 47-11, assigned to the C-130 structures group. (Tr. 20)

8.

After his active employment with Lockheed ended in 1970, plaintiff obtained a master of divinity degree. Plaintiff continued his religious education after he was rehired by Lockheed in 1979, and he ultimately obtained a doctor of divinity degree. (Tr. 74-75, 76-78, 118, 142-143)

9.

Plaintiff's religious studies after being rehired were pursued with Lockheed's knowledge, and the company permitted him to take excused absences from work to complete his education leading to the doctor of divinity degree. Plaintiff was not specifically told that his absence record would not be considered in relation to his eligibility for promotion. (Tr. 134-135, 142, 219)

10.

In addition to his religious studies, plaintiff has served as pastor for several church congregations. Whether as a result of his religious activities or for other reasons, plaintiff regularly had a high rate of unexcused absences and tardies and sometimes left work early (known as a "short time"). From the time of plaintiff's rehire in 1979 to May 5, 1981, plaintiff's periodic employee reviews show a total of 39 absences, tardies, and short times. (Tr. 78-79, 128, 135, 147-148, 216-217; Defendant's Exhibits 5B, 7A, 7B, 7C, and 7D)

11.

Plaintiff has never received any employment related commendations or citations from Lockheed; however, between 1964 and 1967, plaintiff received several disciplinary notices for excessive absenteeism. After his rehire in 1979, plaintiff received two more disciplinary notices. One was for a violation of a company traffic regulation, and the other was for running to exit the plant at the time of a shift change. (Tr. 131-133, 146, 246, 274-276; Defendant's Exhibits 6A, 6B, 6C, 6E, 6F, and 36)

12.

The job of Tool Planner is an hourly, nonmanagement position which involves the drawing up of plans for the use of Lockheed's manufacturing organizations in the construction of aircraft. Without such plans, the production workers would be unable to carry out the engineering designs and construct the aircraft. Thus, the planning division of Lockheed involves an important function in coordinating the execution of plans and specifications for the construction of aircraft. (Tr. 196-197, 201, 229-232)

13.

Hourly rated Tool Planners receive their job assignments from a Manufacturing Planner. The job of Manufacturing Planner is a salaried, non-supervisory position, which involves working closely with the Tool Planner both in making job assignments and in helping the Tool Planners overcome any trouble or problems they may have in carrying out their job assignments. (Tr. 25-27, 204-205)

14.

Jobs assigned to a Tool Planner may take anywhere from 80 manhours to 1500 manhours to complete; and good, reliable attendance is required to ensure the timely completion of longer assignments. The more varied ex-

perience a Tool Planner has at longer, complex jobs, the better qualified he will be for possible promotion to Manufacturing Planner. (Tr. 27, 196-197, 211-215, 219, 237-38)

15.

Because of his high rate of absenteeism (both excused and unexcused) plaintiff could not be assigned many varied, long-range projects as a Tool Planner, but usually performed planning jobs ranging from 80 to 150 hours. Moreover, plaintiff's supervisors testified that he was often absent from his work station for long periods of time, without explanation. As a result of his attendance deficiencies, plaintiff would not be assigned to long term, complex jobs which could have demonstrated his proficiency and qualified him for promotion to Manufacturing Planner. (Tr. 212-215, 237-38, 259-60; Plaintiff's Exhibit 6)

16.

Plaintiff did not make any effort to improve his attendance after his rehire. His co-workers testified that he had told them that he felt like he could come ond go at Lockheed as he pleased, or words to that effect. As a result of his work habits and attendance, Lockheed supervision perceived that plaintiff did not have a positive, dedicated attitude towards his job. (Tr. 176, 181, 202, 211-212, 219-220, 237, 259-60)

17.

The final selection of individuals to be promoted to the job of Manufacturing Planner is made by a Management Selection Committee composed of various heads of departments within the planning organization. The Committee reviews the personnel records and qualifications of candidates for promotion. Manufacturing Planner positions are filled from a pool of many highly qualified Tool Planner candidates, including persons who previously

had been employed as Manufacturing Planners. (Tr. 238-243, 262)

18.

Plaintiff contends that he was discriminated against when Lockheed promoted a younger, white employee, Mr. Dorsey, from Tool Planner to Manufacturing Planner. Plaintiff also cited the promotions of Messrs. Owens and Montgomery as examples of discriminatory decisions. Consistent with the jury's finding, the evidence does not show that Lockheed used race as a consideration in promoting Mr. Dorsey. Lockheed has presented substantial evidence showing that all three promotions were based on legitimate considerations unrelated to race, including:

(a) Plaintiff has been employed in the Tool Planner job slightly longer than either Dorsey or Owens (if their time in that job in the mid 60's is counted); however, most of plaintiff's experience in the Tool Planner job since 1979 has been in short-range projects. There is no evidence to suggest that the Tool Planner experience of Dorsey or Owens since 1979 was similarly limited. Mr. Montgomery, who has been employed continuously by Lockheed since 1951, has considerably more experience than plaintiff as a Tool Planner, and he previously held the job of Manufacturing Planner. (Tr. 212, 215, 261-263, 270-271; Defendant's Exhibits 5, 8, 12, and 25)

(b) Plaintiff's attendance record after his rehire is substantially inferior to the attendance records of Dorsey and Owens for the same time period. Although Montgomery had attendance deficiencies, he had been rated disabled by the Veterans Administration, and his absences were medically-related. In addition, in accordance with a conciliation agreement entered to resolve a charge of handicap discrimination filed by Mr. Montgomery against Lockheed, he was promoted only after his attendance substantially improved. (Tr. 256-257, 264-265, 266-270; Defendant's Exhibits 5B, 7A, 7B, 7C, 7D, 8B, 14A, 14B, 14C, 16B, 18A, 18B, 18C, 18D)

(c) Plaintiff has received no commendations or citations for his job performance at any time during his career with Lockheed. In contrast, Dorsey, Owens, and Montgomery have each received several commendations and citations. (Tr. 168-169, 195-196, 246, 263-264; Defendant's Exhibits 13A, 13B, 17A, 17B, 26A, 26B, 36)

(d) Plaintiff has received several disciplinary notices from Lockheed, including three for excessive absenteeism. In contrast, there is no evidence in the record to suggest that Dorsey, Owens, or Montgomery ever received a disciplinary notice. (Tr. 132-133, 146; Defendant's Exhibits 6A, 6B, 6C, 6E, 6F)

19.

Plaintiff's failure to be promoted to Manufacturing Planner was based solely on his poor attendance; the resultant limited scope of his Tool Planner assignments; and Lockheed's documented perception that Mr. Dorsey and other employees were better qualified for the job of Manufacturing Planner than plaintiff. The promotion decisions in issue were not based on plaintiff's race. (Tr. 211-215, 225, 235-238, 247, 256-257; Plaintiff's Exhibit 6)

II. *CONCLUSIONS OF LAW*

1.

The jurisdiction of this Court is invoked pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, 42 U.S.C. § 1981, and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, to redress plaintiff's claims that he was discriminated against because of his race and age with respect to promotions.

2.

In a disparate treatment case under Title VII, plaintiff has the burden of proving by preponderance of the

evidence that he was discriminated against on the basis of race by Lockheed's less favorable treatment of him in comparison to Lockheed's treatment of similarly situated whites. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

3.

To establish discrimination plaintiff must first make out a prima facie case by

> [proving] actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act."

Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978). *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Cartagena v. Secretary of the Navy*, 618 F.2d 130 (1st Cir. 1980); *Ambush v. Montgomery County Government*, 620 F.2d 1048 (4th Cir. 1980).

4.

Plaintiff may establish a prima facie case of promotion discrimination, by proving (1) that he was a member of a group protected by Title VII; (2) that non-minorities received promotions for which plaintiff was qualified during the relevant time period; (3) and that he was as qualified (by reason of performance, training, and experience) or more qualified than the non-minority persons who received the promotions. *See, e.g., Texas Department of Community Affairs v. Burdine, supra; Coe v. Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981); *Ramirez v. Hofheinz*, 619 F.2d 442 (5th Cir. 1980).

5.

Lockheed does not have the burden of proving that the promotion decisions in issue were not based upon plaintiff's race. The burden of proof of discrimination remains upon the plaintiff throughout the case. In addition, where the defendant offers evidence to show that its promotion decisions were based on reasonable, nondiscriminatory factors, such as comparative qualifications or attendance, plaintiff has the burden of negating such evidence by proving that such factors were a mere pretext for discrimination. *Texas Department of Community Affairs v. Burdine, supra; Anderson v. Savage Laboratories, Inc.*, 675 F.2d 1221 (11th Cir. 1982); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588 (5th Cir. 1978); *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977); *Bittar v. Air Canada*, 512 F.2d 582 (5th Cir. 1975).

6.

The decision as to what criteria shall be considered in determining the qualifications for a job lies fully in the hands of the employer, so long as prohibited, discriminatory criteria are not applied. *Ramirez v. Hofheinz*, 619 F.2d 442 (5th Cir. 1980); *Carter v. Lockheed-Georgia Co.*, 31 E.P.D. ¶ 33,354 (N.D. Ga. Dec. 14, 1982); *Bay v. Goodyear Tire and Rubber Co.*, 23 E.P.D. ¶ 30,903 (S.D. Tex. 1980), *aff'd mem.*, 638 F.2d 1233 (5th Cir. 1981).

7.

A defendant in a case such as this is not required to prove that it made the best possible business decision or even that the business decisions in issue were wise or correct. It is not the function of the Court to second guess the defendant company's rational, business judgments, if it finds the company has explained a legitimate reason for its decision not to promote plaintiff. *Texas Department of Community Affairs v. Burdine, supra;*

Furnco Construction Corp. v. Waters, supra; Moore v. Sears, Roebuck & Co., 683 F.2d 1321 (11th Cir. 1982); *Harberson v. Monsanto Textiles Co.*, 13 E.P.D. ¶ 11,586 (D.S.C. 1976).

8.

If Lockheed explains a legitimate business reason for the promotion decisions in issue, then plaintiff is not entitled to prevail unless he proves that Lockheed's explanation was a pretext, that is, merely an excuse for discriminating against plaintiff on the basis of his race. In order to prove pretext, plaintiff must show either that he met Lockheed's qualifications for promotion, including Lockheed's attendance standards or that other employees not within plaintiff's protected class who had poorer records of performance or similar records of attendance were promoted despite their records. *Texas Department of Community Affairs v. Burdine, supra; Anderson v. Savage Laboratories, Inc., supra.*

9.

The evidence does not show that any poorer performing, lesser qualified white employee received a promotion that plaintiff should have received at any time pertinent to this case. *Ramirez v. Hofheinz, supra*; *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980); *Cartagena v. Secretary of the Navy, supra.*

10.

After hearing the same evidence heard by this Court, the jury in this action concluded that plaintiff had not been intentionally denied promotion because of his race or because of his age. The jury's verdict for Lockheed on plaintiff's racial discrimination claim under 42 U.S.C. § 1981 is conclusive between the parties as to plaintiff's Title VII claim because both claims were based solely on alleged disparate treatment on the basis of race. *Lartius v. Iowa Department of Transportation*, 31 F.E.P. Cas.

1120 (8th Cir. 1983); *Johnson v. University of Bridgeport*, 20 F.E.P. Cas. 1766 (D. Conn. 1979). *See Nilson v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983) (en banc).

11.

Considering Mr. Montgomery's extensive prior experience in the job of Manufacturing Planner and as a Tool Planner, the evidence does not support a pretext claim based upon disparate application of Lockheed's attendance policies. On the contrary, Lockheed's promotion of Mr. Montgomery (after his attendance improved) as part of an agreement to settle his disabled veteran discrimination claim establishes a nonpretextual reason other than race for that promotion. *See e.g., United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Hunter v. St. Louis-San Francisco Railway Co.*, 639 F.2d 424 (8th Cir. 1981); *EEOC v. McCall Printing Corp.*, 633 F.2d 1232 (6th Cir. 1980).

12.

Pretermitting the question of whether or not plaintiff presented sufficient evidence to establish a prima facie case of promotion discrimination on the basis of race, defendant has offered substantial evidence that any adverse actions concerning the plaintiff were based on good faith, legitimate business considerations. Plaintiff has not submitted any evidence which the Court believes would warrant a finding that Lockheed's explanations for its actions were merely pretextual, or that plaintiff's race was a contributing factor leading to Lockheed's failure to promote him. *Texas Department of Community Affairs v. Burdine, supra. See, e.g., Anderson v. Savage Laboratories, Inc., supra; Smalley v. Eatonville*, 640 F.2d 765 (5th Cir. 1980); *Corley v. Jackson Police Department*, 566 F.2d 994 (5th Cir. 1978); *Tonka v. American Telephone & Telegraph Co.*, 26 E.P.D. ¶ 31,963 (N.D. Ga. 1980), *aff'd mem.*, 679 F.2d 251 (11th Cir. 1982).

Accordingly, should the Court of Appeals deem a remand of this case to be necessary, then the Court respectfully prays that the Court of Appeals engage in a limited remand of this case for the purposes of incorporating the foregoing modified findings of fact and conclusions of law in the record on appeal. Except as set forth hereinabove, plaintiff's motion to vacate and/or amend the findings of fact and conclusions of law of May 10, 1983 is hereby DENIED.

IT IS SO ORDERED.

This 25th day of July, 1983.

/s/ Charles A. Moye, Jr.
CHARLES A. MOYE, JR.
Judge
United States District Court